Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-994

LUQMAN ABDUSH-SHAHID,

Petitioner,

against

NEW YORK STATE NARCOTICS ADDICTION CONTROL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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Opinions Below

The decision of the New York Court of Appeals of October 19, 1976, is not reported and appears in the Appendix to the petition, p. 54A. The decision of the Supreme Court of the State of New York, Appellate Division, Second Department, dated May 3, 1976, is reported at 52 A D 2d 846 and appears in the Appendix to the petition, p. 51A. The decision of the Supreme Court of the State of New York, County of Westchester, dated November 10, 1975, is not reported and appears in the Appendix to the petition, p. 20A. The earlier memorandum decision of the New York Court of Appeals is reported at 34 N Y 2d 538, 309 N.E. 2d 872, and appears in the Appendix to the petition, p. 19A.

The earlier decision of the Supreme Court of the State of New York, Appellate Division, Second Department, is reported at 41 A D 2d 803 and appears in the Appendix to the petition, p. 18A. The decision of the Supreme Court of the State of New York, County of Westchester, dated June 8, 1972, is not reported and appears in the Appendix to the petition, p. 16A.

Jurisdiction

The order of the New York Court of Appeals was entered on October 19, 1976. The petition for certiorari was filed on January 18, 1977.* Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (3).

Constitutional Provisions Involved

The Constitution of the United States provides in pertinent part:

> AMENDMENT I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."
>
> AMENDMENT XIV: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Regulations Involved

The two Facility Staff Dress regulations promulgated by respondent dated October 29, 1968, and October 1, 1972, are reproduced in the Appendix to the Petition, pp. 2A, 4A respectively.

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* See affidavit of Paul G. Chevigny, sworn to February 16, 1977, filed with the Court.

Questions Presented

1. May a state agency dismiss a narcotics correction officer in charge of the detention, security, and rehabilitation of narcotics addicts confined pursuant to court order in a state facility because he wears religious garb at work in contravention of the agency's dress regulation for said officers.

2. Does the decision of the New York Court of Appeals, which is fully consistent with prior decisions of this Court, present any substantial federal question which warrants the exercise of this Court's jurisdiction.

Statement of the Case

Petitioner was employed by the respondent New York State Narcotics Addiction Control Commission (now New York State Office of Drug Abuse Services) as a Narcotics Correction Officer until November, 1971, when he was dismissed after a hearing,* for violating the respondent's dress code. Petitioner's job entailed the prevention of escape (14H), security (14H), and rehabilitation of narcotics addicts detained pursuant to court order (10H) in facilities maintained by the State of New York. The respondent had promulgated two "Facility Staff Dress and Grooming" codes or regulations.

The first, promulgated October 19, 1968 (2A) mandated the wearing of a business shirt, jacket and tie. The second, promulgated October 1, 1972, (4A) during the pendency of the litigation and prior to the trial hereafter discussed, which took place in 1975, provided, "all male

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* Numbers in parentheses accompanied by capital letters H, A, and T refer respectively to pages in the hearing record, pages of the appendices to the petition, and pages of the transcript of the trial, discussed hereafter, in the Supreme Court of New York, County of Westchester.

narcotic correction officers shall, while on duty, wear a dress shirt, tie, and full length slacks or trousers. Ties are optional with the employee during the summer months." (9A) The regulation was designed to prevent the imposition on the narcotic addict inmates of any religious or political views of staff members, and to prevent disruption of the rehabilitative process (5A). The regulation only limited clothing worn while on duty (6A). Also, "Only staff members employed as chaplains may wear clothing indicative of religious belief or affiliation." (6A)

Petitioner, a Sunni or Orthodox Muslim, asserted that his faith required him to wear to work a Biadlia, or long caftan, and a skull cap. Upon his refusal to conform to respondent's dress requirements, formal charges were preferred against petitioner pursuant to Section 75 of New York's Civil Service Law and, after a hearing, he was dismissed in November, 1971. Thereafter, petitioner brought a proceeding under Article 78 of New York's Civil Practice Law and Rules in the New York Supreme Court, Westchester County, challenging his dismissal as arbitrary and capricious as well as being unconstitutional. The proceeding was commenced in February, 1972. The Westchester Court, Special Term, dismissed Mr. Abdush-Shahid's petition (16A) and the Appellate Division, Second Department affirmed (18A). Petitioner appealed to the Court of Appeals which remitted to Special Term to explore the availability of a religious waiver ("dispensation") of the requirement to wear religious garb and, if not available, "then whether the needs of the facility justify overriding the religious mandate" (19A).

Pursuant to the order of the Court of Appeals, a trial was held in the Supreme Court, Westchester County. The Court's careful and comprehensive opinion concluded that, based upon the "credible evidence" presented which "preponderated in favor of the respondent," procedures to procure a "dispensation", or waiver, from the wearing of religious garb on duty are provided by the Sunni Muslim Order but were not availed of by petitioner, and the wearing of the Sunni Muslim dress is a form of proselytizing and could have a harmful effect on narcotics addicts under confinement (49A, 50A). [The court also found that there was in fact no written proof of the religious requirement claimed by petitioner.*] Petitioner appealed to the Appellate Division, Second Department, which unanimously affirmed the Westchester County judgment (51A). He subsequently appealed to the Court of Appeals, which dismissed the appeal (54A).

The evidence adduced at the trial in the Supreme Court, Westchester County, and the decision of that court, were the basis of appellate review in New York.

The petitioner offered Koli Ahmad Tawfiq, his Imam (Spiritual Leader) as a witness. Mr. Tawfiq testified that petitioner's religious garb is mandated by his religion. He also testified that there is machinery to obtain a waiver of the requirement to wear religious garb which would have to go through Muslim channels, including Saudi Arabia (27A, 28A). Nevertheless, he stated that he would not seek such a "dispensation", or waiver. Petitioner admitted that a procedure exists to procure a waiver, although in his opinion it is not necessarily likely to be granted (335T, 336T). There was no testimony that such a procedure, or the granting of a waiver, were contrary to petitioner's religious beliefs. Only if such a waiver were granted by Mr. Tawfiq, contrary to the Muslim procedures, would petitioner refuse to recognize it (332T, 31A-32A).

Raymond R. Bara, Director of respondent's Drug Rehabilitation Facilities, and in charge of the Ridge Hill Re-

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* The "Koran" has no such dress requirement. The witness claims that there is a dress provision in a book called the "Hadik", but "although the hearing extended over several days, the Hadik, in which, allegedly, such requirement appears, was never presented to the court" (26A-27A).

habilitation Center, from which petitioner was dismissed, testified on behalf of respondent. His educational, professional, and pragmatic experience with narcotic addicts is extensive (33A). He stated that religious services are provided for narcotics addicts and staff. There is no objection to staff performing religious practices as long as they do not interfere with their duties and are conducted privately (33A). The relationship between staff personnel and inmates is the primary instrument for rehabilitation, and religious dress would have an emotional effect causing the petitioner to be identified with his particular faith and interfere with the inmates' perception of petitioner as a narcotic correction officer who also has a therapeutic function (34A, 35A). He has heard derogatory comments from inmates toward the wearing of Muslim garb and that it represents an individual (narcotic correction officer) who is identified with the Islamic (Muslim) faith (37A, 38A). He stated that respondent has experienced elements of very strong religious animosity, hostility between various religious groups, not only Muslim, but also within "the so-called protestant group" (38A).

Dr. S. Seymour Joseph, a psychiatrist who has held high-level positions with respondent, testified that many inmates at Ridge Hill would have their level of anxiety heightened to a considerable degree by contact with petitioner (39A); that Sunni Muslim dress worn by correction officers would be counter-productive and anti-therapeutic. (Inmates have told him so) (40A). The narcotic correction officer is a model for inmates, and he must present a non-traumatic role (244T, 245T). The typical inmate at Ridge Hill, according to Mr. Bara, is a teenager (47H), and is "emotionally immature, dependent, highly impressionable" (87T).

Dr. Stephen Teach, a psychiatrist and witness for petitioner, testified that clothes often are a means for a drug addict to make contact with someone, and can be used to have the leverage to make changes in the addict (42A,

194T). Reverend Stephen Chinlund, an Episcopalian minister and former head of several narcotics facilities, testified for petitioner. He stated that he doesn't wear his clerical collar when working with inmates because "they *would feel I thought they ought to in some way, adhere to the religion that I was representing by my dress* (46A, emphasis by Court). Cf. testimony of Dr. Joseph, 46A, 47A.

Reasons For Denying The Petition For Certiorari

The decisions of the New York Courts are entirely consistent with prior decisions of this Court and present no substantial federal question which warrants review by this Court.*

A.

Petitioner would have this Court believe that the New York courts were trying to determine whether an ecclesiastical decision is "arbitrary". He cites *Serbian Orthodox Diocese* v. *Milivojevich*, —— U.S. ——, 44 U.S.L.W. 4927 (1976), as well as other decisions involving control of church property. Actually, it was petitioner who brought an Article 78 proceeding in the New York

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* Facts clearly indicate that petitioner's claim may be moot. The remedy he has been seeking consists of an injunction against respondent from enforcing its dress regulations and his reinstatement with full pay (16A). Had petitioner not been dismissed from respondent agency as a narcotic correction officer, he would nevertheless have been laid off on June 2, 1976, on the basis of his seniority. As a result of a drastic budget cutback, the number of facilities in which narcotic correction officers are employed has diminished from fourteen at the beginning of 1976 to only three as of February 4, 1977. (At the time of petitioner's dismissal, there were sixteen such facilities.) The number of narcotic correction officers employed by respondent has been reduced from 988 on February 25, 1976, to 137 as of January 26, 1977. (Information based on data supplied by New York State Office of Drug Abuse Services.)

court to contest an allegedly arbitrary decision by the respondent (16A, 20A). The New York courts merely sought to determine whether there had been a Muslim decision regarding the availability of a procedure to procure a waiver to wear religious garb. Such a procedure, as noted above, was recognized by petitioner, consistent with his religious beliefs. The New York courts did not look behind petitioner's religious beliefs nor challenge an ecclesiastical decision; they did not invade the cognizance of an ecclesiastical tribunal. Therefore, further inquiry into this area is unnecessary, and there is no constitutional question to be decided. Assuming, *arguendo,* that a constitutional issue is raised herein, then its pursuit is academic in view of the constitutional validity of respondent's dress regulations as discussed in B, *infra.*•

B.

Petitioner Luqman Abdush-Shahid maintains that he had a constitutional right to wear Sunni Muslim dress while he served in the capacity of a narcotics correction officer in charge of the security and rehabilitation of drug addicts detained and under treatment pursuant to court order.

The First Amendment right to free exercise of religion is not absolute and may be restricted by the state, even if only upon a showing of a compelling state interest. Valid state regulation is based upon the state's power to promote the health, safety, and general welfare of the state and to prevent impingement of rights asserted by other individuals, *Wisconsin* v. *Yoder,* 406 U.S. 205, 214, 219-220

• Petitioner cites *Sherbert* v. *Verner,* 374 U.S. 398 (1963). There was no question of the availability of a waiver in *Sherbert.* Also, petitioner cites *United States* v. *Ballard,* 322 U.S. 78 (1944). Unlike the issue raised by *Ballard,* the New York courts did not challenge the authenticity of petitioner's beliefs; petitioner offered his spiritual leader as a witness, who testified to the availability of a procedure to procure a waiver (27A, 28A). Even if it were not possible to seek a waiver, the constitutional validity of respondent's dress regulations is supported by decisions of this Court.

(1972), *Braunfeld* v. *Brown,* 366 U.S. 599, 603, 604 (1961). This Court has rejected challenges under the Free Exercise Clause to restrictions on overt acts predicated upon religious beliefs even where the acts are in accord with one's religious convictions. See *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963); *Cleveland* v. *United States,* 329 U.S. 14, 19 (1946); *Prince* v. *Massachusetts,* 321 U.S. 158, 166-167 (1944); and *Reynolds* v. *United States,* 98 U.S. 145, 146 (1878). Cf. *LaRocca* v. *Lane,* 37 N Y 2d 575, 338 N.E. 2d 606 (1975), *cert. den.* —— U.S. ——, 44 U.S.L.W. 3531 (1976).

The second decision of the Supreme Court of New York, County of Westchester (20A), upheld by the Appellate Division, Second Department (51A) and the Court of Appeals (54A), specifically found that the "wearing of Suni Muslim dress is a form of proselytizing" and has a probable "harmful effect on narcotic addicts under confinement" (50A) based upon proof adduced at trial (see Statement of the Case, *supra*). Drug addicts (mostly impressionable teenagers) confined by the state at Ridge Hill under the immediate detention and supervision of narcotics correction officers are compelled to look to the officers for leadership, guidance and example. One of petitioner's witnesses conceded that the "residents" would "feel I thought they ought to in some way adhere to the religion that I was representing by my dress [clerical garb] (46A, 47A)." The addicts, being detained and subjected to the Muslim dress—worn by an officer—have viewed the officer as representing and related to the Islamic faith, even with resultant hostility (38A). Also, there is testimony of probable counter-productive, antitherapeutic anxiety (38A, 39A, 40A) and that the addicts would view the officer, not in his official capacity, but as a representative of a particular religion.•

• Since this was an Article 78 (administrative review) proceeding, the factual disposition cannot be challenged if the conclusion is supported by substantial evidence. *Matter of Collins* v. *Codd,* 38 NY 2d 269, 342 NE 2d 524 (1976).

In *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), reading of passages from the Bible at public schools at the beginning of each day was held violative of the First Amendment's prohibition against the establishment of religion, although students could be excused from participating in such exercises upon written request from their parents. The Court at 374 U.S. 221 recognized that, although participation was voluntary, the Establishment Clause "does not depend upon any showing of direct governmental compulsion," quoting *Engel* v. *Vitale*, 370 U.S. 421, at 430-431 (1962). In the instant case, the narcotics addicts were detained and confined pursuant to court order, an even stronger reason for finding violation of the Establishment Clause than in *School District of Abington Township*. The purpose of the First Amendment is neutrality toward all religions, the creation of complete separation of religious activity and civil authority, 374 U.S. at 215, 217. As this Court states at 374 U.S. 221-222, "When government, the Court says, allies itself with one particular form of religion, the inevitable result is that it incurs 'the hatred, disrespect, and even contempt of those who held contrary views.'" This reaction of narcotics addicts was noted at the trial in the instant case. See also: *Epperson* v. *Arkansas*, 393 U.S. 97, 106-107 (1968) and *McCollum* v. *Board of Education*, 333 U.S. 203, 212 (1948).

Thus, the proof at trial and the New York Court's findings that wearing Muslim dress is a form of proselytizing and could have a harmful effect on narcotics addicts under confinement, accords with the applicable decisions of this Court, both with respect to valid restrictions on First Amendment free exercise rights and with respect to violation of the Establishment Clause. Petitioner's right to wear Muslim dress may be regulated to prevent impingement of the rights of the narcotics addicts and the interest of the state in maintaining neutrality toward all religion and effective therapeutic care of addicts.

Additionally, the instant case falls within the scope of *Kelly* v. *Johnson*, 425 U.S. 238 (1976), in which this Court decided that a regulation limiting the length of a policeman's hair was not violative of the police officer's First Amendment rights, nor of his claims under the Due Process and Equal Protection Clause of the Fourteenth Amendment. Luqman Abdush-Shahid was an officer (narcotics correction officer) challenging a dress regulation which requires specific items of clothing. His spiritual leader testified to the selfsame Muslim objection to wearing a police uniform as well as the clothing mandated for a narcotics correction officer (30A, 31A). A narcotics correction officer is the embodiment of authority (46A, 47A) just as is a policeman.

C.

Petitioner cites *Chicago Police Dept.* v. *Mosley*, 408 U.S. 92 (1972), in support of an argument that respondent's dress regulations create a denial of equal protection of the laws for one particular mode of expression. As discussed above, the rights of the narcotics addicts and of the state would be infringed by the assertion of petitioner's First Amendment expression. The dress regulations of respondent apply equally to all religions.

Finally, petitioner quotes from *Tinker* v. *Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 508 (1969). In *Tinker* this Court stated that the trial court had made no finding that school children's conduct (wearing armbands in protest of the Government's policy in Vietnam) would interfere with the work of their school or impinge upon the rights of others, 393 U.S. at 509. In the instant case, the New York court, in fact, made a specific finding of proselytizing and probable harmful effect on narcotics addicts under confinement (50A) supported by facts in the record. *Tinker* is clearly distinguishable.

In summary, the decisions of the New York courts are entirely consistent with prior decisions of this Court, and

petitioner has failed to present a substantial federal question or any other factor which would motivate the exercise of this Court's certiorari jurisdiction (Supreme Court Rules, Rule 19). His petition for a writ of certiorari should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York
March 3, 1977

Respectfully submitted,

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